IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-544

PENNSYLVANIA ELECTRIC COMPANY,

METROPOLITAN EDISON COMPANY,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

PENNSYLVANIA PUBLIC UTILITY COMMISSION;
BOROUGHS OF KUTZTOWN, GOLDSBORO, &
LEWISBERRY, PENNSYLVANIA; &
ALLEGHENY ELECTRIC COOPERATIVE, INC.,
Intervenors

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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October 1, 1979

INDEX

Page

CITATIONS

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Intervenors

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Pennsylvania Electric Company and Metropolitan Edison Company respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on May 3, 1979.

OPINIONS BELOW

Neither the opinion of the Court of Appeals nor its order (App. A, p. 1a, *infra*) denying rehearing have been reported. The opinion has been filed as part of the Appendix to a pending petition for certiorari to review the decision below. Petition for Certiorari of Public Service Company of New Hampshire, *Public Service Co. of New Hampshire v. FERC*, 48 U.S.L.W. 3049 (U.S. Aug. 14, 1979) (No. 79-169). The Federal Energy Regulatory Commission issued the following four orders:

(1) *Metropolitan Edison Co.*, Order Denying Proposed Fuel Adjustment Clause Surcharge, Docket Nos. ER76-209 & ER76-492 (FERC Dec. 19, 1977) (App. D., pp. 6a-8a, *infra*);

(2)*Metropolitan Edison Co.*, Order Denying Application for Rehearing and Motion for Stay, Docket Nos. ER76-209 & ER76-492 (FERC Feb. 13, 1978) (App. E, pp. 9a-11a, *infra*);

(3) *Pennsylvania Electric Co.*, Order Denying Proposed Fuel Adjustment Clause Surcharge, Docket No. ER76-607 (FERC Dec. 19, 1977) (App. F., pp. 12a-25a, *infra*); and

(4) *Pennsylvania Electric Co.*, Order Denying Application for Rehearing and Motion for Stay, Docket No. ER76-607 (FERC Feb. 13, 1978) (App. G, pp. 26a-28a, *infra*).

None of these orders have been reported.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 3, 1979. A timely petition for rehearing was denied on July 3, 1979, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. §825*l*(b).

QUESTIONS PRESENTED

Whether, in view of its lack of authority to issue reparation orders, the Federal Energy Regulatory Commission has the power to approve a just and reasonable electric utility tariff provision which seeks to recover for monies spent to purchase fuel consumed in generating electricity, where the monies were spent before the tariff's effective date, but the fuel costs to be recovered are properly allocated as costs to billing months occurring after the tariff's effective date?

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

This case involves Sections 201(a), 205(a), 205(b), 205(c), 205(d), 205(e), and 313(b) of the Federal Power Act, 16 U.S.C. §§824(a), 824d(a), 824d(b), 824d(c), 824d(d), 824d(e), & 825*l*(b) (1976), and 28 U.S.C. §1254(1) (1976). Also involved is Section 35.22(e)(3) of the Federal Energy Regulatory Commission's Rules. 18 C.F.R. §35.22(e)(3). These provisions are before this Court as Appendices J and K to the Petition for Certiorari, *Jersey Central Power & Light Co. v. FERC,* 48 U.S.L.W. 3833 (U.S. May 3, 1979) (No. 78-1665).

STATEMENT OF CASE

A. Background

This case arises from the Federal Energy Regulatory Commission's ("FERC" or "Commission") rejection of two electric utility tariff provisions under which Pennsylvania Electric Company ("Penelec") and Metropolitan Edison Company ("Met Ed") are attempting to obtain $1,418,729 and $519,726 from their respective wholesale customers in compensation for fuel consumed to provide them with electric power. The provisions at issue were temporary surcharges designed to

recover prudently incurred fuel costs. The need for recovery provisions stemmed from petitioners' decision to employ updated bases in their new fuel clauses and corresponding updates to the fuel costs recovered in the new base energy charges[1] when the 1976 clauses were filed.[2] By use of the surcharges, petitioners sought to recover fuel costs which, under traditional accrual accounting principles, were not recorded as expenses until after the effective date of the new tariffs, even though the cash to purchase the fuel had been spent before that date. The superseded fuel adjustment clauses would have collected these costs had the petitioners not updated the base in the new fuel clauses.

B. Commission Proceedings

By orders dated February 27, 1976, and May 7, 1976, the Commission accepted the surcharge provisions for filing, sus-

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[1] Like most electric utility tariffs, the companies' tariffs assess a demand charge to recover relatively fixed, capacity-related costs and an energy charge to recover the variable costs of supplying electricity. Each company's energy charge has two components: a predetermined base charge for each kilowatt-hour of electricity consumed during the billing month and a fuel adjustment charge, designed in conjunction with the base energy charge, to match revenues recovered with actual fuel costs. Under the companies' fuel adjustment clauses, each customer's monthly bill is raised or lowered by the product of the number of kilowatt hours of electricity used during the billing month and the difference between the average cost of all fuel Penelec or Met Ed consumed during the three month period ending two months prior to the billing month and a preset base fuel cost. The surcharge provisions would impose for periods of approximately ten to twelve months beginning on the effective date of the 1976 tariffs additional charges of between 1.500 and 2.700 mills per kilowatt hour of consumption, subject to adjustments for delivery voltage losses and gross receipts taxes. (App. A, pp. 1a-2a, *infra;* App. B, pp. 3a-4a, *infra*).

[2] The preceding clauses, which were superseded when the 1976 clauses became effective, are printed in the appendix to the decision below. *Public Service Co. of New Hampshire v. FERC*, No. 77-1592, Slip. Op. at 41-44 (D.C. Cir. May 3, 1979), *petition for cert. filed by Public Service Co. of New Hampshire*, 48 U.S.L.W. 3049 (U.S. Aug. 14, 1979) (No. 79-169).

pended them, and ordered hearings to examine their lawfulness.[3] As a result of these orders, Met Ed's surcharge became effective subject to refund on February 29, 1976, and Penelec's surcharge became effective subject to refund on October 8, 1976. At the ensuing hearings, both petitioners attempted to prove that their surcharge provisions were just and reasonable.

The presiding law judges' initial decisions,[4] the Commission's orders affirming those decisions, (App. D, p. 6a, *infra;* App. F, p. 12a, *infra*) and the Commission's orders denying rehearing, (App. E, p. 9a, *infra;* App. G, p. 26a, *infra*), all rejected petitioners' surcharge provisions. While the presiding law judges phrased their holdings in terms of the provisions' justness and reasonableness,[5] the Commission did not reach such questions. Instead the Commission grounded its decisions on the interpretation accorded the rule against retroactive ratemaking in Opinion No. 790, *Public Service Co. of New Hampshire,* 19 P.U.R. 4th 210 (FPC, 1977), *aff'd* No. 77-1592 (D.C. Cir. May 3, 1979). (*See* App. D, p. 7a, *infra;* App. F, pp. 17a-22a, *infra*).

C. Decisions Below

The United States Court of Appeals for the District of Columbia Circuit affirmed on the basis of its agreement with

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[3] Metropolitan Edison Co., Order Accepting for Filing and Suspending Proposed Fuel Adjustment Surcharge, Denying Waiver, Establishing Procedures, Consolidating Dockets, Denying Motions and Granting Interventions, Docket Nos. ER76-492 & ER76-209 (FERC Feb. 27, 1976); Pennsylvania Electric Co., Order Accepting for Filing and Suspending Proposed Fuel Adjustment Clause and Establishing Procedures, Docket No. ER76-607 (FERC May 7, 1976).

[4] *Metropolitan Edison Co.,* Initial Decision on Fuel Adjustment Surcharge Proposal, Docket Nos. ER76-209 & ER76-492 (FPC Feb. 15, 1977) [hereinafter *Met Ed Initial Decision*]; *Pennsylvania Electric Co.,* Initial Decision on Proposed Surcharge to Recover Fuel Costs, Docket No. ER76-607 (FPC Mar. 22, 1977) [hereinafter *Penelec Initial Decision*].

[5] *Met Ed Initial Decision, supra* at 7; *Penelec Initial Decision, supra* at 8.

the Commission's interpretation of petitioners' superseded fuel adjustment clauses and the belief that approval of the surcharge provisions therefore would constitute impermissible retroactive ratemaking. *Public Service Co. of New Hampshire v. FERC*, No. 77-1592 (D.C. Cir. May 3, 1979), *petition for cert. filed by Public Service Company of New Hampshire*, 48 U.S.L.W. 3049 (U.S. Aug. 14, 1979) (No. 79-169).[6] Penelec and Met Ed's subsequent petition for rehearing was denied without opinion. (App. C, p. 5a, *infra*).

REASONS FOR GRANTING THE WRIT

This Court has before it in No. 78-1185 a petition for certiorari filed by Jersey Central Power & Light Company to review the decision of the United States Court of Appeals for the Third Circuit in *Jersey Central Power & Light Co. v. FERC*, 589 F.2d 142 (3d Cir. 1978), *petition for cert. filed*, 48 U.S.L.W. 3833 (U.S. May 15, 1979)(No. 78-1665). Also pending before this Court is a petition for certiorari in No. 79-169 filed by Public Service Company of New Hampshire to review the decision below. Penelec and Met Ed believe that these petitions establish (a) the existence of a substantial conflict among the Circuit Courts of Appeals with regard to FERC's authority to determine whether electric utility tariff provisions are just and reasonable and (b) the unduly expansive nature of the interpretation accorded the rule against retroactive ratemaking by the Commission and by the United States Courts of Appeals for the Third, Fourth, and D.C. Circuits. Petitioners also believe that the petitions demonstrate the continuing importance of the questions raised by that interpretation to the administration of the Federal Power Act.

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[6] By orders issued April 13, 1978, and June 6, 1978, the Court of Appeals had consolidated Met Ed's and Penelec's appeals with those pending in Appalachian Power Co., Docket No. ER77-325 (FPC June 30, 1977) and in Public Service Co. of New Hampshire, 19 PUR Co. 4th 210 (FPC 1977).

In view of these pending petitions, Penelec and Met Ed desire only to focus the Court's attention on the nature of the Commission's actions in this case. From the outset, petitioners have contended that the surcharge provisions were designed to recover fuel costs which would have been recovered had the superseded fuel adjustment clauses remained in effect. [R. 429, 473, 514, 568, 575, 580]. The Commission did not reject this position. As a result, FERC could not have rejected the surcharge provisions on the ground that they attempted to impose additional charges not recoverable under the superseded fuel adjustment clauses. Because of this, it is apparent that, under the Commission's formulation of the rule against retroactive ratemaking, petitioners are not attempting to increase rates retroactively "to make up for deficiencies in [the] formula [in their superseded rate schedules]." *Pennsylvania Electric Co.*, Order Denying Proposed Fuel Adjustment Clause Surcharge, Docket No. ER76-607 (FERC Dec. 19, 1977). (App. F, p. 22a, *infra*). Met Ed and Penelec submit that this and other factors warrant a decision by this Court on the question whether FERC should be required to assess the justness and reasonableness of the various electric utility tariff provisions at issue.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the D.C. Circuit.

Respectfully submitted,

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APPENDIX A

METROPOLITAN EDISON COMPANY Original Sheet No. 18
FPC Electric Tariff
Original Volume No. 1

RESALE POWER SERVICE
TEMPORARY SURCHARGE FOR RECOVERY OF FUEL COSTS THAT WOULD NOT BE RECOVERED BY THE FUEL CLAUSE EFFECTIVE JANUARY 1, 1976

A temporary surcharge shall be applied to each Kilowatt-hour (KWH) supplied under this tariff for the purpose of recovering the fuel costs incurred prior to and recoverable after December 31, 1975 under the fuel clause effective through that date but not recoverable under the fuel clause effective January 1, 1976. This temporary surcharge is to apply to the KWH of all monthly bills rendered in the twelve consecutive months after the effective date of the surcharge, except that the surcharge shall terminate when the amount to be recovered, $435,307 after application of the "L" factor but excluding any applicable gross receipts taxes, has been billed. If, in the twelfth month, the full amount has not been recovered, the surcharge will be adjusted to recover the remaining balance.

This surcharge shall be applied in accordance with the formula set forth below and shall be computed to the nearest one-thousandth of 1 mill.

$$\text{Surcharge} = 1.500 \text{ mills per KWH} \times L \times \frac{1}{1-T}$$

Where:

"L" is a factor for adjustment of losses to the delivery voltage. The "L" factor is 0.93 for delivery at transmission voltages and is 0.97 for delivery at distribution voltages.

1 is a factor for recovery of any applicable Pennsylvania Gross Receipts Tax; "T" being the currently effective Pennsylvania Gross Receipts Tax Rate.

METROPOLITAN EDISON COMPANY

SUPPLEMENT TO EXHIBIT B

RESALE POWER SERVICE
TEMPORARY SURCHARGE FOR RECOVERY OF FUEL COSTS THAT WOULD NOT BE RECOVERED BY THE FUEL CLAUSE EFFECTIVE JANUARY 1, 1976

A temporary surcharge shall be applied to each Kilowatt-hour (KWH) of supplemental service supplied under this tariff for the purpose of recovering the fuel costs incurred prior to and recoverable after December 31, 1975 under the fuel clause effective through that date but not recoverable under the fuel clause effective January 1, 1976. This temporary surcharge is to apply to the KWH of all monthly bills rendered in the nine consecutive months after the effective date of the surcharge except that the surcharge shall terminate when the amount to be recovered, $84,419 after application of the "L" factor but excluding any applicable gross receipts taxes, has been billed. If, in the ninth month, the full amount has not been recovered, the surcharge will be adjusted to recover the remaining balance.

This surcharge shall be applied in accordance with the formula set forth below and shall be computed to the nearest one-thousandth of 1 mill.

$$\text{Surcharge} = 1.500 \text{ mills per KWH} \times L \times \frac{1}{1-T}$$

Where:

"L" is a factor for adjustment of losses to the delivery voltage. The "L" factor is 0.97 for delivery at distribution voltages.

1 is a factor for recovery of any applicable Pennsylvania Gross Receipts Tax; "T" being the currently effective Pennsylvania Gross Receipts Tax Rate.

PENNSYLVANIA ELECTRIC COMPANY Original Sheet No. 16
FPC Electric Tariff
Original Volume No. 1

RESALE POWER SERVICE
TEMPORARY ADDITIONAL CHARGE FOR RECOVERY OF FUEL COSTS THAT WOULD NOT BE RECOVERED BY THE FUEL CLAUSE EFFECTIVE FEBRUARY 26, 1976

A temporary additional charge shall be applied to each Kilowatt-hour (KWH) supplied under this tariff for the purpose of recovering the fuel costs incurred through and recoverable after February 25, 1976 under the fuel clause effective through that date but not recoverable under the fuel clause or base rates effective February 26, 1976. This temporary charge is to apply to the KWH of all monthly bills rendered in the twelve consecutive months after its effective date except that it shall terminate when the amount to be recovered, $330,622 after application of the "L" factor but excluding any applicable gross receipts taxes, has been billed. If, in the twelfth month, the full amount has not been recovered, the charge will be adjusted to recover the remaining balance.

This charge shall be applied in accordance with the formula set forth below and shall be computed to the nearest one-thousandth of 1 mill.

$$\text{Temporary charge} = 1.800 \text{ mills per KWH} \times L \times \frac{1}{1-T}$$

Where:

"L" is a factor for adjustment of losses to the delivery voltage. The "L" factor is 0.98 for delivery at distribution voltages.

1 is a factor for recovery of any applicable Pennsylvania Gross Receipts Tax; "T" being the currently effective Pennsylvania Gross Receipts Tax Rate.

PENNSYLVANIA ELECTRIC COMPANY

SUPPLEMENT TO EXHIBIT B

RESALE SUPPLEMENTAL POWER
TEMPORARY ADDITIONAL CHARGE FOR RECOVERY OF FUEL COSTS THAT WOULD NOT BE RECOVERED BY THE FUEL CLAUSE EFFECTIVE FEBRUARY 26, 1976

A temporary charge shall be applied to each Kilowatt-hour (KWH) of supplemental service for the purpose of recovering the fuel costs incurred through and recoverable after February 25, 1976 under the fuel clause effective through that date but not recoverable under the fuel clause or base rates effective February 26, 1976. This temporary charge is to apply to the KWH of all monthly bills rendered in the twelve consecutive months after its effective date except that it shall terminate when the amounts to be recovered, $1,088,067, after application of the "L" factor but excluding any applicable gross receipts taxes, has been billed. If, in the twelfth month, the full amount has not been received, the charge will be adjusted to recover the remaining balance.

This charge shall be applied in accordance with the formula set forth below and shall be computed to the nearest one-thousandth of 1 mill.

$$\text{Temporary charge} = 2.700 \text{ mills per KWH} \times L \times \frac{1}{1-T}$$

Where:

"L" is a factor for adjustment of losses to the delivery voltage. The "L" factor is 0.98 for delivery at distribution voltages.

1 is a factor for recovery of any applicable Pennsylvania Gross Receipts Tax; "T" being the currently effective Pennsylvania Gross Receipts Tax Rate.

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1329 September Term, 1978

PENNSYLVANIA ELECTRIC COMPANY,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

ALLEGHENY ELECTRIC COOPERATIVE, INC.,
Intervenor

AND CONSOLIDATED CASE NO. 78-1330

BEFORE: Tamm and MacKinnon, Circuit Judges; and Pratt*, District Judge, United States District for the District of Columbia

ORDER

Upon consideration of petitioners' (Pennsylvania Electric Company and Metropolitan Edison Company) petition for rehearing, it is

ORDERED, by the Court, that petitioners' aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

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*Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: DON S. SMITH, Acting Chairman;
MATTHEW HOLDEN, JR., and
GEORGE R. HALL.

Metropolitan Edison Company **Docket No. ER76-209**
ER76-492

ORDER DENYING PROPOSED FUEL ADJUSTMENT CLAUSE SURCHARGE

(Issued December 19, 1977)

On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg., 46267 (September 15, 1977), the Federal Power Commission[1] ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary of Energy and the Federal Energy Regulatory Commission (FERC) which, as an independent commission within the Department of Energy, was activated on October 1, 1977.

The "savings provisions" of Section 705(b) of the DOE Act provide that proceedings pending before the FPC on the date the DOE Act takes effect shall not be affected and that orders shall be issued in such proceedings as if the DOE Act had not been enacted. All such proceedings shall be continued and further actions shall be taken by the appropriate component of DOE now responsible for the function under the DOE Act and regulations promulgated thereunder. The functions which are the subject of this proceeding were specifically

[1] The "Commission" when used in the context of an action taken prior to October 1, 1977, refers to the FPC; when used otherwise, the reference is to the FERC.

transferred to the FERC by Section 402(a) (1) or 402(a) (2) of the DOE Act.

The joint regulation adopted on October 1, 1977 by the Secretary and the FERC entitled "Transfer of Proceedings to the Secretary of Energy and the FERC," 10 CFR____, provided that this proceeding would be continued before the FERC. The FERC takes action in this proceeding in accordance with the above-mentioned authorities.

The Presiding Administrative Law Judge (Judge) in his initial decision, issued February 15, 1977, denied Metropolitan Edison Company's (ME) request for a fuel adjustment clause surcharge. The factual and procedural background are accurately set out in the Judge's initial decision and need not be restated here.

For the reasons stated in the companion order, Order Denying Proposed Fuel Adjustment Clause Surcharge (*Pennsylvania Electric Company,* Docket No. ER76-607), issued today, we are hereby denying the proposed fuel adjustment clause surcharge of ME. The points in this proceeding are in all relevant respects the same as those raised in the Pennsylvania Electric Company proceeding and are answered by us in the above-referenced order.

The Commission finds:

(1) Consistent with our discussion herein, ME's proposed fuel adjustment clause surcharge should be rejected.

(2) The Initial Decision of February 15, 1977, should be approved.

The Commission orders:

(A) ME's proposed fuel adjustment clause surcharge is hereby rejected.

(B) The Initial Decision of February 15, 1977, is hereby affirmed.

(C) Within 75 days, ME shall refund to its customers all amounts, if any, collected in excess of those which would have been payable under the rates and charges approved in this proceeding, together with interest at a rate of nine percent per annum from the date of payment to ME to the date of refund.

(D) Within fifteen days after refunds have been made ME shall file with the Commission a compliance report showing monthly billing determinants and revenues under prior, present, and adjudicated rates; monthly adjudicated rate increase, monthly rate refund, and the monthly interest computation, together with the summary of such information for the total refund period. A copy of such report shall also be furnished to each state commission within whose jurisdiction the wholesale customer distributes and sells electric energy at retail.

By the commission
(S E A L)

KENNETH F. PLUMB,
Secretary.

APPENDIX E

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: CHARLES B. CURTIS, Chairman; DON S. SMITH, GEORGIANA SHELDON, MATTHEW HOLDEN, JR., and GEORGE R. HALL.

Metropolitan Edison Company } **Docket No. ER76-209**
ER76-492

ORDER DENYING APPLICATION FOR REHEARING AND MOTION FOR STAY

(Issued February 13, 1978)

On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg., 46267 (September 15, 1977), the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary of Energy and the Federal Energy Regulatory Commission (FERC) which, as an independent commission within the Department of Energy, was activated on October 1, 1977.

The "savings provisions" of Section 705(b) of the DOE Act provide that proceedings pending before the FPC on the date the DOE Act takes effect shall not be affected and that orders shall be issued in such proceedings as if the DOE Act had not been enacted. All such proceedings shall be continued and further actions shall be taken by the appropriate component of DOE now responsible for the function under the DOE Act and regulations promulgated thereunder. The functions which are the subject of this proceeding were specifically transferred to the FERC by Section 402(a)(1) or 402(a)(2) of the DOE Act.

The joint regulation adopted on October 1, 1977 by the Secretary and the FERC entitled "Transfer of Proceedings to the Secretary of Energy and the FERC," 10 CFR____, provided that this proceeding would be continued before the FERC. The FERC takes action in this proceeding in accordance with the above-mentioned authorities.

On January 17, 1978, Metropolitan Edison Company (MET-ED) filed an Application For Rehearing and Motion For Stay. MET-ED asks that the FERC reverse its Order Denying Proposed Fuel Adjustment Clause Surcharge, issued December 19, 1977. MET-ED also asks, that if the FERC does not reverse its December 19, 1977 order, that the FERC stay MET-ED's refund obligations pursuant to that December 19, 1977 order pending judicial review. Finally, MET-ED asks that if the FERC denies its Motion For Stay and if the Court of Appeals overturns the FERC, that the FERC state that MET-ED can institute a rate surcharge to recoup, with interest, the amount it refunds.

As to MET-ED's Application For Rehearing, we find that MET-ED presents no new facts or legal principles which warrant any modification of our December 19, 1977 order.

As to MET-ED's Motion For Stay, we hereby deny that motion for the reasons stated in our Order Denying Stay (*Jersey Central Power & Light Company,* Docket No. ER76-813), issued January 20, 1978. The points raised by MET-ED's Motion For Stay are in all relevant respects the same as those raised by Jersey Central's Motion For Stay and are answered by us in the above-referenced order.

Should the Commission's decision eventually be overturned on appeal, the Court, or the Commission, would be empowered to order MET-ED to be placed in the same position it would have been had the Commission approved the fuel

adjustment clause surcharge provision as originally filed. This would include reinstitution of the proposed fuel adjustment clause surcharge provision and a provision permitting MET-ED to recover interest on the amounts at issue.[1]

The Commission finds:

MET-ED's Application For Rehearing And Motion For Stay filed on January 17, 1978, should be denied.

The Commission orders:

MET-ED's Application For Rehearing And Motion For Stay filed on January 17, 1978, are hereby denied.

By the Commission.
(S E A L)

KENNETH F. PLUMB,
Secretary.

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[1] *Maine Public Service Company,* Docket No. E-8264, issued November 9, 1977; *Public Service Company of New Hampshire,* Docket No. ER76-285, issued October 7, 1977; *Boston Edison Company,* Docket No. ER77-558, *et al.,* issued September 15, 1977.

APPENDIX F

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: DON S. SMITH, Acting Chairman;
MATTHEW HOLDEN, JR., and
GEORGE R. HALL.

Pennsylvania Electric Company } **Docket No. ER76-607**

ORDER DENYING PROPOSED FUEL ADJUSTMENT CLAUSE SURCHARGE

(Issued December 19, 1977)

On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), the Federal Power Commission[1] ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary of Energy and the Federal Energy Regulatory Commission (FERC) which, as an independent commission within the Department of Energy, was activated on October 1, 1977.

The "savings provisions" of Section 705(b) of the DOE Act provide that proceedings pending before the FPC on the date the DOE Act takes effect shall not be affected and that orders shall be issued in such proceedings as if the DOE Act had not been enacted. All such proceedings shall be continued and further actions shall be taken by the appropriate component of DOE now responsible for the function under the DOE Act and regulations promulgated thereunder. The functions which are the subject of this proceeding were specifically

[1] The "Commission" when used in the context of an action taken prior to October 1, 1977, refers to the FPC; when used otherwise, the reference is to the FERC.

transferred to the FERC by Section 402(a) (1) or 402(a) (2) of the DOE Act.

The joint regulation adopted on October 1, 1977 by the Secretary and the FERC entitled "Transfer of Proceedings to the Secretary of Energy and the FERC," 10 CFR____, provided that this proceeding would be continued before the FERC. The FERC takes action in this proceeding in accordance with the above mentioned authorities.

NATURE OF PROCEEDING

On April 8, 1976, Pennsylvania Electric Company (Penelec) tendered for filing revisions to certain rate schedules[2] designed to recover, through temporary surcharges, allegedly unbilled fuel costs incurred from November 1, 1975 through February 25, 1976. By this filing Penelec sought to place into effect a temporary surcharge of 1.8 mills per kilowatt-hour to recover $330,662 for service to the 12 all-requirements tariff customers and a temporary surcharge of 2.7 mills per kilowatt-hour to recover $1,088,067 for service to Allegheny Electric Cooperative, Inc. (Allegheny), its supplemental power contract customer. The surcharge would be applied only until the respective amounts, plus applicable gross receipts taxes paid by Penelec, are recovered. The surcharges would collect the claimed amounts within approximately 12 months in the case of the tariff customers and 10 months in the case of Allegheny. Penelec states that, absent approval of the surcharge, these amounts would remain uncollected because Penelec revised its

[2] (1) Original Sheet No. 16 to F.P.C. Electric Tariff, Original Volume No. 1, applicable to six investor-owned electric utilities—Waterford Electric Light Co., Wellsboro Electric Co., Elkland Electric Co., Rockingham Electric Co., Windber Electric Co., and West Penn Power Co., (at Lobo Station)—and to the Boroughs of Berlin, East Conemaugh, Hooversville, Smethport, Summerhill and Girard, Pennsylvania; and (2) a supplement to Exhibit B of Penelec's Wheeling and Supplemental Power Agreement with Allegheny Electric Cooperative, Inc.

fuel clause effective February 26, 1976, pursuant to a Commission order issued December 24, 1975, in Docket No. ER76-301.[3] Penelec contends that the amount in question would have been recovered in March through June of 1976 under the superseded fuel clause, but are not recoverable under the new fuel adjustment clause (fuel clause or FAC) or the new base rates unless and until fuel costs return to at or below the original FAC base period cost.

On May 3, 1976, a joint petition to intervene was filed by Allegheny and the Boroughs of Berlin, East Conemaugh, Hooversville, Smethport, Summerhill and Girard, Pennsylvania (Allegheny and the Boroughs being hereinafter collectively referred to as "Customers"). Customers alleged, among other things, that the surcharge would result in double recovery of the fuel charges which Penelec claimed would not be recovered, and that the surcharge would constitute a retroactive increase in the rates previously charged by Penelec. Customers further moved that the Commission reject the rate schedule revisions tendered for filing in this proceeding.

By order issued May 7, 1976, the Commission suspended the operation of the fuel cost surcharges for five months, or until October 8, 1976, when they were allowed to become effective, subject to refund. The Commission also granted Customers' petition to intervene and directed that the matter be set for hearing.

On March 22, 1977, the Presiding Administrative Law Judge (Judge) issued his initial decision (ID) denying the proposed surcharges and finding them to be unjust, unreasonable, and otherwise unlawful. The Judge further states that he knows of no valid theory upon which Penelec can be permitted to receive the proposed surcharges. The Judge notes that out-of-

[3] This order accepted for filing, subject to refund, Penelec's proposed general rate increase applicable to Allegheny and the tariff customers, filed November 26, 1975, in Docket No. ER76-301, including the revised fuel adjustment clause.

date factors in Penelec's fuel clauses[4] are at the root of Penelec's problem and suggests that Penelec file a "no-lag" fuel clause *i.e.*, a fuel clause more designed to recover truly current costs. The Judge points out that the Commission's regulations make no provision for an interim "make-up" surcharge of the kind herein proposed.

The Fuel Clause Regulation and Penelec's Fuel Clauses

Section 35.14 of the Commission's Regulations authorizes the utilization of fuel adjustment clauses. That part of Section 35.14 directly germane to the issue in this proceeding reads as follows:

> (a) Fuel adjustment clauses which are not in conformity with the principles set out below are not in the public interest. These regulations contemplate that the filing of proposed rate schedules which embody fuel clauses failing to conform to the following principles may result in suspension of those parts of such rate schedules:
>
> (1) The fuel clause shall be of the form that provides for periodic adjustment per kwh of sales equal to the difference between the fuel cost per kwh of sales in the base period and in the current period:
>
> $$\text{Adjustment Factor} = \frac{Fm}{Sm} - \frac{Fb}{Sb}$$
>
> Where: "F" is the expense of fossil and nuclear fuel in the base (b) and current (m) periods; and "S" is the kwh sales in the sales in the base and current periods, all as defined below.
>
> (2) Fuel costs (F) shall be the cost of;

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[4] Both the superseded fuel adjustment clause and the new fuel adjustment clause which became effective February 26, 1976 contain the identical lag provision which specifies that "current period" fuel costs "are to be determined as the three month totals for the period ending with the second calendar month preceding the billing month". These costs are then applied to the kilowatt hours for the billing month.

(i) Fossil and nuclear fuel *consumed* in the utility's own plants, and the utility's share of fossil and nuclear fuel *consumed* in jointly owned or leased plants.

* * *

The Judge in this proceeding summarized Penelec's problem with respect to the above regulation as follows:

> Penelec's fuel clauses, prior and subsequent to the revision effective February 26, 1976, are substantially identical in form, although the FAC base period unit cost $\frac{(Fb)}{Sb}$ was increased from 4.745 mills per kwh to 12.086 mills per kwh. Both the original and revised clauses provide that the current fuel expense and current kwh sales factors for the ratio $\frac{(Fm)}{Sm}$ "are to be determined as the three month totals for the period ending with the second calendar month preceding the billing month." This provision is the root of Penelec's difficulty: by unqualifiedly defining the "current period" factors as, in effect, the average of those experienced three, four and five months earlier than those existing during the true current period—i.e., the billing month—it has, like several other utilities, devised a clause under which it is mathematically impossible to recover the cumulative excess of the cost of fuel per kwh in the true current period over that in the substantially earlier "current period" as defined, until the unit cost per kwh decreases to or below the point of the original FAC base cost per kwh, and stays there long enough to recover the number of dollars unrecovered by reason of the built-in lag. The number of dollars unrecovered is a function of kwh sales and unit fuel cost per kwh. With the sales trend line generally expected to rise, and the fuel cost per kwh unlikely to return to the 1972 level of Penelec's original FAC

base period cost, the possibility that Penelec will at any future time be made completely whole under its existing fuel clause seems remote. (ID slip at pp 3-4).

DISCUSSION

The issue in this proceeding is whether or not Penelec should be permitted to fully recover (through the application of a temporary surcharge) past fuel costs which Penelec claims are not recoverable due to the lag inherent in its fuel adjustment clause design.

Penelec filed a brief on exceptions urging that the initial decision issued on March 22, 1977, rejecting the surcharge be reversed. Penelec claims that it has always intended the fuel adjustment clause to recover actual past fuel costs. Penelec contends that the temporary surcharge is intended as a *substitute for* the superseded fuel clause to complete recovery of fuel costs incurred from November, 1975 through February 25, 1976, but not recovered in billings under the old fuel clause due to the lag between months used to determine "current" costs, for billing purposes, and the month during which current services are being billed. Penelec states that it is fully aware of *Public Service Company of New Hampshire,* Docket No. ER76-285, Opinion No. 790, issued March 22, 1977, and that it believes Opinion No. 790 to be unlawful in that it violates the Commission's regulations (Section 35.14) that fuel clauses recover actual fuel costs.

Both Staff and Customers in their briefs opposing exceptions claim that the issues in this proceeding have already been resolved by Opinion 790. Indeed, Customers urge expedited consideration based on the identity of the issue raised here and in Opinion No. 790.

We can see no valid reason why the surcharge at issue here should be treated differently than the surcharge that was denied in Opinion No. 790. The surcharge of Penelec here has to be

denied as retroactive ratemaking under the analysis of Opinion No. 790. Further, while the facts here and in Opinion No. 790 are substantially similar in almost all important respects, there is one difference which makes Penelec's case even weaker. Under the facts of Opinion No. 790, the alleged undercollection by Public Service Company of New Hampshire (PSNH) was caused by terminating the lag provision and going to current month fuel costs, while with Penelec the lag provision remained unchanged and the alleged undercollection was caused by a change in the base fuel costs.[5] Thus, PSNH would be unable to make up in subsequent periods any underrecoveries of fuel costs incurred in the period prior to the change (elimination of the two month lag provision). In other words, PSNH would not be able to recover all of its fuel costs incurred during November and December, 1975, in the billings for January and February, 1976, as it would have collected under the old fuel clause. Penelec, on the other hand, retaining the same lag provision, will not have this problem. The Judge in this case explained this (ID slip at p. 4) as follows:

> The ultimate effect of the lag is not affected by the revision of the fuel clause to increase the base period unit fuel cost to value in the approximate neighborhood of current costs and sales, accompanied by an equivalent increase in base energy rates. Theoretically the collections in a given month are put on a truly current basis to the extent of the increase in base energy rates; but since the fuel clause retains its arbitrary definition of "current period," actual collections in a billing period are automatically adjusted to unit costs computed over a period up to five months

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[5] Penelec is arguing, in effect, that the base rates recover for current costs, while the fuel adjustment clause recovers for actual past fuel costs. This, of course, is erroneous as pointed out by Staff witness Tindal who stated that Penelec has failed to recognize "... that the basic energy rates to AEC and wholesale tariff customers recoup fuel costs not collected by means of the respective fuel clauses ..." (Tr. 106).

> earlier, so *that the total rate per kwh in the billing month is the same as it would have been had the base energy rates and fuel clause base not been revised.* The "fuel cost adjustment" will be smaller, as of any given time, and may be negative (as it actually has been under Penelec's new FAC base) instead of positive, because it is made against a higher base. *The amount of money collected, from increased base energy rates plus fuel adjustment charges, will be the same.* (Footnote ommitted) (emphasis supplied).

The Commission in Opinion No. 790, *supra,* recognized that where there is no change in the lag provision of the fuel adjustment clause, there is not even an equitable justification for the imposition of a surcharge:

> Had PSNH maintained its old system of a two month lag the problem of a surcharge would never have arisen. PSNH would have consistently received current month revenues based on the costs incurred during the second preceding month. While PSNH may consider itself to be, under this method, two months behind in collecting revenue under the fuel adjustment clause, they are no more behind than is any utility which collects current revenues based on costs incurred during a past test period. (Slip op. at p. 13).

Penelec contends that it should recover its actual fuel costs in order to be made whole. While fuel adjustment clauses are generally intended to recover actual costs, they must be designed in such a manner as to produce that result. If fuel adjustment clauses are designed to recover in current billing months, costs which are indexed to those which are incurred in

prior months, there will almost inevitably be some mismatch[6] between fuel costs incurred associated with actual current month sales and fuel cost recoveries (or revenues) associated with those sales. Penelec, of course, has the option of designing its fuel clause so as to produce a match of billing month fuel costs with billing month fuel cost recoveries if it chooses to do so. Should Penelec elect to adopt a "no-lag" fuel clause design, it should be recognized that it would not eliminate any unrecovered fuel expenses heretofore accumulated, but it would prevent further build-ups of unrecovered fuel costs.[7] The Judge spoke of this rate design problem when he stated:

> [T]here is no merit in Penelec's claim that its present difficulty is caused by the Commission's requirement, if such there was, that it up-date its FAC base period cost. On the contrary, when Penelec revised its clause to up-date the base, it continued to use the same out-of-date factors that it had employed in its original clause; that is, the same

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[6] The Commission recognized this in Opinion No. 633, *New England Power Co.*, 48 FPC 899,908-9 (1972), where it states:

> We would observe .... that while every fuel adjustment clause should be designed to produce as nearly as practicable a mirror image of the cost of fuel upon the price of energy which is delivered by an electric utility, we must expect ripples in that reflection. *Because of the time factor involved in gathering and assimilating data* expressing the number of dollars spent for gallons of oil or tons of coal in terms of dollars per kilowatt-hour, and mailing and collecting the resulting billings, *there must be some imprecision in matching fuel expense dollars with delivered energy revenue dollars for any given date or any given period of time.* (Emphasis supplied).

[7] The net build-up in fuel costs not recovered, as reflected by the record in this proceeding, are the result of both the lag which is inherent in the Company's fuel adjustment clauses and a situation in which fuel costs have steadily increased over the periods involved. It should be recognized, however, that should Penelec's fuel costs begin to decline over a period of time, the lag present in its fuel clause would operate to recover fuel-related revenues in current months in excess of the fuel costs incurred in making such current month sales.

> procedure that caused the present build-up of unrecovered costs, which would inevitably cause the same condition to occur again (even if Penelec were permitted its catch-up surcharge at this time), unless there were no trend in future fuel costs. (ID slip at p. 5).

The purpose of a fuel adjustment clause is to allow a utility to pass through to its customers, without the necessity for a complete rate filing, the changes in fuel cost it experiences. Fuel adjustment clauses are authorized by the Commission as part of a utility's rate structure and are permitted to enable a utility to keep its fuel-related recoveries reasonably in line with its fuel costs. However, this Commission never contemplated that fuel adjustment clauses were to relieve utilities from all risks of doing business. Further, imposition of the proposed surcharge here would be a violation of the filed rate doctrine since a utility's rates must be applied only in accordance with its rate schedules on file with this Commission.[8] Here, of course, the fuel adjustment clauses are part of Penelec's filed rates. It should also be noted that while the charge under the fuel clause may change from month to month, the formula used to compute that charge remains the same. "Thus, it is the fuel adjustment formula, not the monthly fuel adjustment factors derived from the increased (decreased) cost of fuel, which constitutes a part of the rates."[9] The fuel adjustment clause of Penelec here does not have any provision which would allow any deviation from the fuel adjustment formula. Penelec is in effect seeking a retroactive adjustment of that filed rate formula.

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[8] *In Montana-Dakota Utilities Company* v. *Northwestern Public Service Company,* 341 U.S. 246, 251 (1951) the Supreme Court stated a public utility "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission."

[9] *Electric and Water Plant Board of the City of Frankfort, Kentucky, et al. Kentucky Utilities Company,* Opinion No. 760 (April 29, 1976) (Slip op. at p. 15).

During the period the old fuel adjustment clause was in effect each customer was billed monthly according to the rate calculated in accordance with the fuel adjustment formula then in effect. After each customer had paid its bill, Penelec collected everything it was entitled to receive under the then existing rate schedule. It may not now retroactively collect rates to make up for deficiencies in that formula. As the Supreme Court stated in *F.P.C.* v. *Tennessee Gas Transmission Company,* 371 U.S. 145, 153 (1962):

> The company having initially filed the rates and either collected an illegal return or failed to collect a sufficient one must, under the theory of the Act, shoulder the hazards incident to its action including not only the refund of any illegal gain but also its loses where its filed rate is found to be inadequate.

The Commission in Opinion No. 790, *supra*, held that the proposed fuel surcharges in that proceeding would constitute retroactive ratemaking and stated as follows:

> During the thirty-six months the superseded fuel clause was in effect each customer was billed monthly based on the rate determined by the fuel adjustment formula then in effect. After a customer had paid that bill the company had received everything it was entitled to receive under the then existing rate schedule. The fact that this rate schedule may not have adequately compensated the company for its costs incurred at that time *does not permit us to retroactively increase that rate.* It is well established that the Federal Power Commission has no authority to order reparations and can only set rates for the future.[10] (Slip op. at p. 12) (emphasis supplied)

One further point regarding Penelec's intent with respect to its fuel clauses should be noted. While Penelec states that it has

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[10] *F.P.C.* v. *Hope Natural Gas Company* 320 U.S. 591, 618 (1944); *State Corporation Commission of Kansas* v. *F.P.C.,* 215 F.2d 176, 184 (8th Cir. 1954).

always been its intention that the fuel adjustment clauses recover past fuel costs, Penelec began billing under its fuel clauses when they first became effective. Thus, under Penelec's theory, the effect of the fuel clause would be to charge customers at the start of fuel clause billings for costs based on a period of time before there was a fuel clause. Penelec, in its brief on exceptions, calls this a "remote piece of evidence" and points to its offer to offset the amount of the requested surcharge by the amount Penelec collected from the Customers based on charges derived from costs prior to the initial effective date of its fuel adjustment clause. This *post hoc* rationalization is not persuasive. As the Judge noted, the facts here support Staff's argument that Penelec deliberately used (in its fuel cost adjustment clauses) past fuel costs as a "proxy" for current costs. (ID slip at p. 6).

Penelec tries to further support its position by analogizing the fuel adjustment clause treatment, with Commission treatment of Purchased Gas Adjustment Clauses. The Commission stated in Opinion No. 790, *supra,* that this analogy is not appropriate:

> PSNH's reliance on the alleged similarity between fuel adjustment clauses and purchased gas cost adjustment provisions is inapposite. PGA adjustments differ from fuel adjustment clauses in several respects. PGA adjustments are not automatically passed through and included in the customer's rates; they must be filed with the Commission. PGA's can be filed no more frequently than semi-annually, while fuel adjustment clauses take effect monthly. PGA clauses are designed to provide for after the fact matching of actual costs and revenues. PGA clauses permitting this matching of actual costs with revenues are included as part of the filed rates under a pipeline's tariff unlike the fuel adjustment clause at issue here. (Slip op. at p. 13).

In summary, the Commission has addressed this almost identical issue in Opinion No. 790. The only factual difference of any consequence (for the purposes of this decision) between this case and opinion No. 790 is one, as discussed above, that makes Penelec's case even weaker. The legal arguments raised in this proceeding were disposed of in Opinion No. 790. Accordingly, the precedent of Opinion No. 790 must govern the outcome here. The legal reasoning which supports that opinion is equally applicable here and Penelec's proposed surcharge must be denied.

The Commission finds:

(1) Consistent with our discussion herein, Penelec's proposed fuel adjustment clause surcharge should be rejected.

(2) The Initial Decision of March 22, 1977, should be affirmed.

The Commission orders:

(A) Penelec's proposed fuel adjustment clause surcharge is hereby rejected.

(B) The Initial Decision of March 22, 1977, is hereby affirmed.

(C) Within 75 days, Penelec shall refund to its customers all amounts, if any, collected in excess of those which would have been payable under the rates and charges approved in this proceeding, together with interest at a rate of nine percent per annum from the date of payment to Penelec to the date of refund.

(D) Within fifteen days after refunds have been made Penelec shall file with the Commission a compliance report showing monthly billing determinants and revenues under prior, present, and adjudicated rates; monthly adjudicated rate increase, monthly rate refund, and the monthly interest computation, together with the summary of such information for the

total refund period. A copy of such report shall also be furnished to each state commission within whose jurisdiction the wholesale customer distributes and sells electric energy at retail.

By the Commission.
(S E A L)

KENNETH F. PLUMB,
Secretary.

APPENDIX G

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: CHARLES B. CURTIS, Chairman; DON S. SMITH, GEORGIANA SHELDON, MATTHEW HOLDEN, JR., and GEORGE R. HALL.

Pennsylvania Electric Company } **Docket No. ER76-607**

ORDER DENYING APPLICATION FOR REHEARING AND MOTION FOR STAY

(Issued February 13, 1978)

On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DOE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary of Energy and the Federal Energy Regulatory Commission (FERC) which, as an independent commission within the Department of Energy, was activated on October 1, 1977.

The "savings provisions" of Section 705(b) of the DOE Act provide that proceedings pending before the FPC on the date the DOE Act takes effect shall not be affected and that orders shall be issued in such proceedings as if the DOE Act had not been enacted. All such proceedings shall be continued and further actions shall be taken by the appropriate component of DOE now responsible for the function under the DOE Act and regulations promulgated thereunder. The functions which are the subject of this proceeding were specifically transferred to the FERC by Section 402(a)(1) or 402(a)(2) of the DOE Act.

The joint regulation adopted on October 1, 1977 by the Secretary and the FERC entitled "Transfer of Proceedings to the Secretary of Energy and the FERC," 10 CFR , provided that this proceeding would be continued before the FERC. The FERC takes action in this proceeding in accordance with the above mentioned authorities.

On January 17, 1978, Pennsylvania Electric Company (Penelec) filed an Application for Rehearing And Motion For Stay. Penelec asks that the FERC reverse its Order Denying Proposed Fuel Adjustment Clause Surcharge, issued December 19, 1977. Penelec also asks, that if the FERC does not reverse its December 19, 1977 order, that the FERC stay Penelec's refund obligations pursuant to that December 19, 1977 order pending judicial review. Finally, Penelec asks that if the FERC denies its Motion For Stay and if the Court of Appeals overturns the FERC, that the FERC state that Penelec can institute a rate surcharge to recoup, with interest, the amount it refunds.

As to Penelec's Application For Rehearing, we find that Penelec presents no new facts or legal principles which warrant any modification of our December 19, 1977 order.

As to Penelec's Motion For Stay, we hereby deny that motion for the reasons stated in our Order Denying Stay (*Jersey Central Power & Light Company*, Docket No. ER76-813), issued January 20, 1978. The points raised by Penelec's Motion For Stay are in all relevant respects the same as those raised by Jersey Central's Motion For Stay and are answered by us in the above referenced order.

Should the Commission's decision eventually be overturned on appeal, the Court, or the Commission, would be empowered to order Penelec to be placed in the same position it would have been had the Commission, approved the fuel adjustment clause surcharge provision as originally filed. This would include reinstitution of the proposed fuel adjustment

clause surcharge provision and a provision permitting Penelec to recover interest on the amounts at issue.[1]

The Commission finds:

Penelec's Application For Rehearing And Motion For Stay filed on January 17, 1978, should be denied.

The Commission orders:

Penelec's Application For Rehearing And Motion For Stay filed on January 17, 1978, are hereby denied.

By the Commission.
(S E A L)

KENNETH F. PLUMB,
Secretary

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[1] *Maine Public Service Company,* Docket No. E-8264, issued November 9, 1977; *Public Service Company of New Hampshire,* Docket No. ER76-285, issued October 7, 1977; *Boston Edison Company,* Docket No. ER77-558, *et al.,* issued September 15, 1977.

No. 79-544

In the Supreme Court of the United States

OCTOBER TERM, 1979

PENNSYLVANIA ELECTRIC COMPANY,
METROPOLITAN EDISON COMPANY, PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

Petitioners, electric utility companies that are subsidiaries of General Public Utilities Corporation, contend that the court of appeals erred in affirming orders of the Federal Energy Regulatory Commission rejecting temporary surcharges filed as part of wholesale electric tariffs to collect fuel costs in addition to those recovered under the automatic fuel adjustment clauses included in the tariffs.[1]

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[1]The opinion of the court of appeals is reported as *Public Service Company of New Hampshire* v. *FERC*, 600 F. 2d 944 (D.C. Cir. 1979). It is set forth at pages 1a-45a of the appendix to the petition for a writ of certiorari in *Public Service Company of New Hampshire* v. *FERC*, No. 79-169. That appendix which contains the opinions of the court of appeals and the Commission in related cases will be referred to as "PSNH App."

1. Pennsylvania Electric Company (Penelec), in 1973, and Metropolitan Edison Company (Met Ed), in 1974, filed tariffs containing fuel adjustment clauses (PSNH App. 39a-42a) that became effective in those years. The clauses provided that a fuel cost adjustment factor, determined "to the nearest one-thousandth of 1 mill per kilowatt-hour in accordance with the formula set forth below, shall be applied to all kilowatt-hours supplied during the billing month" (*id.* at 39a). The formulas listed various components, including a predetermined base period fuel cost per kilowatt-hour, and factors for actual fuel costs, kilowatt-hours generated, and sales thereof in the "current" period (*ibid.*). They also provided that the latter three factors were "to be determined as the three month totals for the period ending with the second calendar month preceeding the billing month" (*id.* at 40a, 42a). Thus, for example, under the formulas bills for kilowatt-hours supplied in June contained an adjustment based on fuel costs actually incurred in a prior period: January, February and March.

Met Ed, on October 31, 1975, and Penelec, on November 26, 1975, filed new fuel adjustment clauses designed to conform to the Commission's Order No. 517 (18 C.F.R. 35.14), which also contained an increased base fuel rate (Pet. App. 16a). On January 28, 1976 and April 8, 1976, Met Ed and Penelec, respectively, filed proposed temporary surcharges to recover fuel costs which the utilities claimed had become uncollectable as a result of the new, higher base rate, because of the three month "lag" in the fuel adjustment clauses (Pet. App. 13a-14a, 18a-19a). It is the lawfulness of the surcharges that is at issue in this case.

Met Ed and Penelec claimed that the surcharges were designed to permit them to recover fuel costs actually incurred during the last four months that the superseded

fuel adjustment clauses were in effect. They contended that, without the surcharges, recovery of those costs would be lost because they could not be recovered under the superseded tariffs (which would apply to the billing for power delivered for those months) in view of the provision in those tariffs providing that cost factors in the adjustment formula were to be based on costs "for the period ending with the second calendar month preceding the billing month" (PSNH App. 40a, 42a). The utilities argued that this surcharge was permissible because the superseded fuel adjustment clauses were intended to defer the recovery of the costs incurred in the current billing month to later months, and claimed that the surcharges simply permitted the recovery of deferred costs that would have been recoverable under the superseded tariff (J.A. 428-442, 513-530).[2] The wholesale customers and Commission trial staff argued that the tariff simply used past fuel costs as a measure of current charges, and that no costs were deferred (J.A. 444-457, 536-554).

In initial decisions after hearings under Section 205(e) of the Federal Power Act, 16 U.S.C. 824d(e), the administrative law judges held that the surcharges were not just and reasonable (J.A. 486-492, 579-587). The Commission agreed (Pet. App. 6a-28a). The court of appeals affirmed the Commission's orders in a consolidated proceeding (PSNH App. 1a-45a), rehearing denied (Pet. App. 5a).

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[2] "J.A." refers to Volume II of the joint appendix in the court of appeals which contains the relevant portions of the records of the proceedings before the Commission regarding Met Ed's and Penelec's surcharges.

2. The considerations that warranted denial of the petition for a writ of certiorari in *Jersey Central* v. *FERC*, No. 78-1665 (Oct. 1, 1979), equally apply to this case. Also applicable here are the points elaborated in our brief in opposition to the petition in *Public Service Company of New Hampshire* v. *FERC*, No. 79-169, one of the cases consolidated with the instant proceedings before the District of Columbia Circuit.

As in *Jersey Central, supra*, and *Public Service Company of New Hampshire, supra*, the issue is one of characterization: did Met Ed's and Penelec's superseded fuel clauses provide for deferred recovery of costs actually incurred, as in a cost-of-service tariff, or for recovery on the basis of costs in a specific period, as in a fixed rate tariff?

The superseded fuel clauses of Met Ed and Penelec are identical in their pertinent terms to that of their affiliate, Jersey Central, which is also a subsidiary of General Public Utilities (*Jersey Central*, No. 78-1665, Pet. App. 1a-2a). That clause was found by the Commission to be a fixed rate type tariff which recovered "costs for a given month based on costs incurred during a prior test period" (FERC Br. in Opp. in *Jersey Central*, No. 78-1665, at 10).

The Commission found that Met Ed's and Penelec's prior fuel clauses were also similar in operation to the fuel clauses of Public Service Company of New Hampshire (PSNH), which the Commission held in its Opinion No. 790 to be "a fixed rate tariff, which provides current compensation on the basis of costs incurred during a past period" (PSNH App. 61a). In the case of Penelec, the Commission expressly found (Pet. App. 24a):

> The only factual difference of any consequence (for the purposes of this decision) between this case and opinion No. 790 is one, as discussed above, that makes Penelec's case even weaker.

That factual difference was that Penelec, unlike PSNH, had not eliminated the lag in its fuel clause (Pet. App. 18a). The increase in the base fuel rate simply meant that more of the fuel costs were recovered through the base rate instead of through the adjustment charge: the total rate per kwh remained the same (Pet. App. 19a). There could therefore be no fuel costs which Penelec was precluded from recovering because of the increase in the base fuel rate in its fuel adjustment clause and thus no "skipped over" costs to be recovered by means of a surcharge (Pet. App. 19a). Penelec's proposed surcharge was therefore rejected (Pet. App. 24a). Since the Commission found that Met Ed's superseded fuel clause and its proposed surcharge were identical in all relevant respects to Penelec's, the Commission properly relied on the reasoning in the Penelec order to approve the initial decision and reject Met Ed's proposed surcharge (Pet. App. 7a).

The courts of appeals in both *Jersey Central Power & Light Co.* v. *FERC*, 589 F. 2d 142 (3d Cir. 1978) and *Public Service Company of New Hampshire, supra*, agreed with the Commission's interpretation of the superseded fuel clauses used by Met Ed and Penelec. See FERC Br. in Opp., *Jersey Central*, No. 78-1665, at 10-11. FERC Br. in Opp., *Public Service Co. of New Hampshire*, No. 79-169, at 8-9.

Having found Met Ed's and Penelec's superseded fuel adjustment clauses to have been fixed rate tariffs, the Commission correctly concluded that the Federal Power Act precludes approval of the surcharges. This conclusion rests on the rule against retroactive ratemaking and the related "filed rate doctrine" that a utility may charge only those rates set forth in tariffs on file with the Commission. See FERC Br. in Opp. in *Jersey Central*, No. 78-1665, at 11-12.

As we explained in our briefs in opposition in *Jersey Central* (at 12-14) and in *Public Service Co. of New Hampshire* (at 10), we believe that the conflict between the decision of the court of appeals in these proceedings and that of the First Circuit in *Maine Public Service Co.* v. *FPC*, 579 F. 2d 659 (1978), does not warrant this Court's present review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General

ROBERT R. NORDHAUS
General Counsel

LYNN N. HARGIS
Assistant General Counsel
Federal Energy Regulatory Commission

NOVEMBER 1979

DOJ-1979-11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-544

PENNSYLVANIA ELECTRIC COMPANY,
METROPOLITAN EDISON COMPANY,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

PENNSYLVANIA PUBLIC UTILITY COMMISSION; BOROUGH OF KUTZTOWN, GOLDSBORO & LEWISBERRY, PENNSYLVANIA; & ALLEGHENY ELECTRIC COOPERATIVE, INC.,
Intervenors

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF INTERVENORS ALLEGHENY ELECTRIC COOPERATIVE, INC. AND BOROUGHS IN OPPOSITION

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OPINIONS BELOW

The initial opinion of the Court of Appeals is set forth in the Appendix to the pending Petition for Certiorari to review the decision below. Petition for Certiorari of Public Service Company of New Hampshire, *Public Service Company of New Hampshire* v. *Federal Energy Regulatory Commission*, 48 U.S.L.W. 3049 (U.S. Aug. 1, 1979) (No. 79-169). The Orders of the Federal Energy Regulatory Commission ("Commission") which were reviewed by the Court of Appeals are set forth as Appendices D, E, F, and G, respectively, to the Petition for Certiorari.

Neither the opinion of the Court of Appeals, its order denying rehearing, nor any of the Orders of the Commission have been reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Did the Federal Energy Regulatory Commission err in rejecting Petitioners' proposed fuel adjustment clause surcharges as constituting retroactive ratemaking and as violations of the filed rate doctrine?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are adequately set forth in the Petition.

STATEMENT

This brief is field on behalf of Allegheny Electric Cooperative, Inc. and Boroughs of East Conemaugh,

Girard, Hooversville, Smethport and Summerhill (being hereinafter collectively referred to as the Customers). Allegheny purchases electric power and energy at wholesale from Pennsylvania Electric Company ("Penelec") and Metropolitan Edison Company ("Met-Ed") (Penelec and Met-Ed being hereinafter collectively referred to as the "Petitioners"). The other Customers purchase electric power and energy at wholesale from Met-Ed. The Petitioners are sister companies, being operating subsidiaries of General Public Utilities Corporation. The Petitioners petitioned for review of Orders issued by the Commission [1] on December 19, 1977 denying the Petitioners' respective claims for fuel cost adjustment surcharges and also the Commission's Orders of February 13, 1978 denying the Petitioners' applications for rehearing of the Commission's December 19, 1977 Orders.

The Commission permits public utilities under its jurisdiction to include in rate tariffs filed with it a fuel cost adjustment clause providing that there be added to (or subtracted from) the base energy rate provided for in the tariff an amount reflecting the increase (or decrease) in the cost of fuel provided for in the base energy rate, which has occurred subsequent to the fixing of the base energy rate. Because the fuel cost figures for the billing month are not available at the time of billing,

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[1] On October 1, 1977, pursuant to the provisions of the Department of Energy Organization Act (DoE Act), Public Law 95-91, 91 Stat. 565 (August 4, 1977) and Executive Order No. 12009, 42 Fed. Reg. 46267 (September 15, 1977), the Federal Power Commission ceased to exist and its functions and regulatory responsibilities were transferred to the Secretary of the Department of Energy, and the Federal Energy Regulatory Commission which, as an independent commission within the Department of Energy, was activated on October 1, 1977. All references herein to the "Commission" shall be to the Federal Power Commission for the period prior to October 1, 1977 and to the Federal Energy Regulatory Commission for the period commencing October 1, 1977.

usually the fuel adjustment clause will use the costs for an earlier month or months and apply such costs to the kWh sold in the billing month.

On October 31, 1975, Met-Ed filed with the Commission a proposed rate increase for its wholesale customers of approximately $4,525,000 per year. The Commission accepted the filing and allowed it to become effective on January 1, 1976, subject to refund. In this rate increase, Met-Ed changed the base cost of its fuel adjustment clause from 6.03 mills per kilowatt hours (kWh) to 13.232 per kWh. The purpose of this change was to relate this cost to the 1975-1976 test year costs and to include nuclear fuel as well as fossil fuel generation costs in the base cost. Formerly, base cost was based on the 1972 fossil fuel cost data. No other change was made in the method of computing Met-Ed's fuel adjustment clause.

Both the old fuel clause and the new fuel clause provide that the fuel adjustment factor is to be applied to the kWh used by the Customers *in the billing month.*

Both clauses provide that the adjustment factors to be applied to such kWh "are to be determined as the three month totals for the period ending with the second calendar month preceding the billing month." (This is often referred to in the industry as the billing lag.)

Thus, Met-Ed continued to use the fuel cost actually incurred during the first three months of the prior four month period to impute the fuel cost included in the bills rendered for the billing period.

On November 26, 1975, Penelec filed with the Commission a proposed rate increase to its wholesale customers, of $9,412,064 per year. The Commission accepted the filing and allowed it to become effective on February 26, 1976, subject to refund. In this rate increase Penelec changed the base of its fuel adjustment clause from 4.745 mills per kWh to 12.086 per kWh. The purpose of

this change was to relate this cost to the cost of fuel in the test period, the 12 months ending June 30, 1976. Formerly, base cost was based on the fuel cost levels in 1971 and 1972. As with Met-Ed, no other change was made in the method of computing Penelec's fuel adjustment clause.

Both the old fuel clause and the new fuel clause provide that the fuel adjustment factor is to be applied to the kWh used by the Customers *in the billing month.*

Both clauses provide that the adjustment factors to be applied to such kWh "are to be determined as the three month totals for the period ending with the second calendar month preceding the billing month."

Thus, Penelec continued to use the fuel costs actually incurred during the first three months of the prior four month period to impute the fuel cost included in the bills rendered for the billing period.[2]

As shown above, in both the new and previous fuel adjustment clauses of the Petitioners the fuel adjustment factor is calculated as the difference between the base cost of fuel and the cost of fuel in the current period, defined, by the Petitioners, in both old and new clauses, as the average cost of fuel in the three-month period ending with the second month preceding the billing month. Thus, the rate increase filing by the Petitioners had no effect on the total amount to be recovered for fuel in any month under the combination of the base rate and the adjustment factor. Dollars were merely shifted from the adjustment factor to the base rate.

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[2] As can be seen, the Petitioners' actions were in all relevant respects identical, and they advanced identical testimony and arguments on behalf of their actions. In this brief, Customers will at times refer to Penelec, and at other times refer to Met-Ed. It should be understood that references to the actions and arguments of either Petitioner apply to both.

However, the Petitioners both claimed in subsequent filings that on the effective date of the proposed rate increases they would have incurred fuel costs above the costs in the pre-existing clause which would not be recovered because of the billing lag, and the updating of the base cost of fuel.

On January 28, 1976, Met-Ed filed for an additional rate increase consisting of a temporary surcharge to recover $519,726 in fuel costs which Met-Ed asserted would otherwise be unrecoverable; and on April 8, 1976, Penelec made a similar filing for a temporary surcharge to recover $1,418,729 which it likewise claimed would otherwise be unrecoverable. Both surcharges were designed to spread the collection of the alleged deficiency over a period of approximately 12 months.

By Order issued February 27, 1976, the Commission granted Allegheny Electric Cooperative, Inc.'s ("Allegheny") Petition to Intervene in the Met-Ed fuel surcharge case, Docket No. ER76-492, and on May 7, 1976 the Commission granted the Petition to Intervene of Allegheny and the Boroughs in Penelec's fuel surcharge case, Docket No. ER76-607.

In Opinions Nos. 790 and 790-A issued March 22, 1977 and May 20, 1977, the Commission in *Public Service Company of New Hampshire*, Docket No. ER76-285, affirmed an Initial Decision by an Administrative Law Judge which rejected the company's (PSNH) attempt to collect through a proposed surcharge fuel revenues which PSNH claimed were uncollected by its previously effective tariff. The Commission agreed with the Judge that any such attempt was unjust, and unreasonable, as constituting retroactive ratemaking. (Op. 790 at 3-4, 11-15).

The Commission, on December 19, 1977, based on its decision in *Public Service Company of New Hampshire*,

Opinion No. 790, rejected the fuel surcharges proposed by the Petitioners, and denied the Petitioners' applications for rehearing. The Commission did, however, point out one salient difference between claims made by Public Service Company of New Hampshire and the Petitioners:

> ". . . . while the facts here and in Opinion No. 790 are substantially similar in almost all important respects, there is one difference which makes Penelec's case even weaker. Under the facts of Opinion No. 790, the alleged undercollection by Public Service Company of New Hamshire (PSNH) was caused by terminating the lag provision and going to current month fuel costs, while with Penelec the lag provision remained unchanged and the alleged undercollection was caused by a change in the base fuel costs.[5] Thus, PSNH would be unable to make up in subsequent periods any underrecoveries of fuel costs incurred in the period prior to the change (elimination of the two month lag provision). In other words, PSNH would not be able to recover all of its fuel costs incurred during November and December, 1975, in the billings for January and February, 1976, as it would have collected under the old fuel clause. Penelec, on the other hand, retaining the same lag provision, will not have this problem. The Judge in this case explained this (ID slip at p.4) as follows:
>
> > " 'The ultimate effect of the lag is not affected by the revision of the fuel clause to increase the base period unit fuel cost to a value in the approximate neighborhood of current costs and sales accompanied by an equivalent increase in base energy rates. Theoretically the collections in a given month are put on a truly current basis to the extent of the increase in base energy rates; but since the fuel clause retains its arbitrary definition of "current period," actual collections in a billing period are automatically adjusted to unit costs computed over a period up to five months earlier, *so that the total rate per*

kwh in the billing month is the same as it would have been had the base energy rates and fuel clause base not been revised. The "fuel cost adjustment" will be smaller as of any given time, and may be negative (as it actually has been under Penelec's new FAC base) instead of positive, because it is made against a higher base. *The amount of money collected, from increased base energy rates plus fuel adjustment charges, will be the same.*' (Footnote omitted) (emphasis supplied)."

"[5] Penelec is arguing, in effect, that the base rates recover for current costs, while the fuel adjustment clause recovers for actual past fuel costs. This, of course, is erroneous as pointed out by Staff witness Tindal who stated that Penelec has failed to recognize ". . . that the basic energy rates to AEC and wholesale tariff customers recoup fuel costs not collected by means of the respective fuel clauses . . ." (Tr. 106).

Rehearing was denied on February 13, 1978. The Orders of December 19, 1977 and February 13, 1978 are the Orders which the Petitioners are appealing in this proceeding.

ARGUMENT

The Petition fails to establish grounds which would warrant review by this Court on *certiorari.*

The Petition relies on the Petition for Certiorari filed by Jersey Central Power & Light to review the decision of the United States Court of Appeals for the Third Circuit in *Jersey Central Power & Light* v. *Federal Energy Regulatory Commission*, 589 F.2d 142 (3rd. Cir. 1978). *Petition for Ceriorari Filed* 48 U.S.L.W. 3833 (U.S. May 15, 1979) (No. 78-1665).

This Court has denied *certiorari* in the *Jersey Central* case. 48 U.S.L.W. 3222 (U.S. Oct. 1, 1979).

Jersey Central is a sister company of the Petitioners. Its substantive claim, which was rejected by the Commission and the Third Circuit, and on which *certiorari* was denied, is identical with the claim made by Petitioners in this case. Any possible reason for granting *certiorari* in this case would have been likewise applicable in the Jersey Central case. In fact, the Jersey Central case was a stronger candidate for *certiorari* than the instant cases since Jersey Central's original filing with the Commission was rejected on summary disposition without a hearing, whereas the Petitioners here were accorded full evidentiary hearings at the Commission. Jersey Central's arguments in favor of a grant of *certiorari* were fully rebutted in Brief of Intervenor Allegheny Electric Cooperative, Inc. In Opposition, filed July 2, 1979, in the *Jersey Central* case, supra.

It is important to point out that the Petition erroneously stated the "Question Presented". The Petition refers to the tariff provision at issue here as "a just and reasonable electric utility tariff provision." The record is lacking any evidence tending to establish that the tariff provision in question is "just and reasonable".

The "Question Presented" also refers to the tariff provision as seeking "to recover for monies spent to purchase fuel consumed in generating electricity, where the monies were spent before the tariff's effective date, but the fuel costs to be recovered are properly allocated as cost to the billing months occurring after the tariff's effective date."

As found by both the Court of Appeals and the Commission, and as is readily discernible from a reading of the tariff, such fuel costs are *not* properly allocated as costs to billing months occurring after the tariff's effective date.

The opinion of the Court of Appeals is clearly correct. It carefully analyzed all of the arguments made by the Petitioners and rejected them. The Court of Appeals made it abundantly clear that its ruling was based on a straightforward application of the Federal Power Act's prohibition against retroactive ratemaking which has so often been affirmed by both the District of Columbia Circuit and this Court. The opinion below demonstrates that Petitioners' claims are in reality that the Commission made a factual mistake in its interpretation of their fuel adjustment clauses. The Court analyzed Petitioners' arguments and concluded both that the Commission was clearly correct and that the Commission's decision was supported by substantial evidence in the record.

Thus, the case presents no question of law, but merely the proper interpretation of a contract. Such a case does not merit *certiorari*. The only legal issue is beyond question. Petitioners do not attempt to attack the rule on retroactive ratemaking. The issue here has to do solely with the proper interpretation of the tariff.

One final argument by Petitioners must be dealt with. That is their claim that the Comission never rejected their contention that the surcharge provisions were designed to recover fuel costs which would have been recovered had the superseded fuel adjustment clauses remained in effect. This is simply not true, as shown in the quotation from the Commission's order rejecting Penelec's surcharge, quoted in Customers' Statement in this brief, *supra*, at pages 7-8. The Commission clearly did reject this position when it quoted with approval and affirmed the conclusion of the Initial Decision that Penelec's fuel revenues would be identical under both the old and new clauses.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

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